No. 16732

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

*vs.*

INTERNATIONAL HOD CARRIERS', BUILDING AND COMMON LABORERS' UNION OF AMERICA, LOCAL 300, AFL-CIO,

*Respondent.*

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**On Petition for Enforcement of an Order of the National Labor Relations Board, and on Answer by Petitioner for Review and Setting Aside of the Order of the National Labor Relations Board.**

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## Brief for Respondent, International Hod Carriers', Building and Common Laborers' Union of America, Local 300, AFL-CIO.

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## BRIEF OF RESPONDENT.

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### I.

### Jurisdiction.

We concur that the jurisdiction of this Court is as set forth in the Brief for the Petitioner.

We add thereto, however, that it is additionally invoked by the Answer of the Respondent [R. 36] requesting review and setting aside of the Order of the National Labor Relations Board.

## II.
## Statement of the Case.

While Petitioner is correct in its statement of the case that the Board did make the Findings indicated, under the testimony adduced at the hearing before the Trial Examiner, Respondent maintains that there was no violation of Section 8(b) (2) and (1)(A) of the Act, and that Respondent Union was operating under a valid short form Agreement [Pet. Ex. 1; R. 66].

At this juncture, may we note that while the Board filed its Certificate with this Court certifying all documents in this case, including the stenographic transcript of the testimony taken before the Trial Examiner on December 3, 4 and 18, 1958, together with all Exhibits and Items 5 and 6 of said Certificate of February 8, 1960 of the National Labor Relations Board, which items are the Respondent's Motion for Reconsideration, received under date of August 11, 1959, and a copy of the Order denying the Motion, issued by the National Labor Relations Board, of September 4, 1959; and while the Respondent, in the Answer to the Petition for Enforcement, filed with this Court [R. 36], stated in Paragraph 3 thereof:—

> "Respondent assumes that the Board will proceed and file the transcript as set forth in said Paragraph 3 of said Petition."

and said Answer continues to refer to the "record as a whole," and said Answer [R. 38], in its Wherefore clause, states:—

> "Wherefore, Respondent herein respectfully prays that this Honorable Court review this entire case and upon such review and upon the entire transcript . . ."

Nonetheless, the actual transcript of the record contains portions of the testimony, and also omits the Motion of Respondent for Reconsideration addressed to the Board, and the Order of the Board thereon, and certain exhibits admitted in evidence and offered by Respondent.

Reference will be made by Respondent to portions of the stenographic transcript of the testimony taken before the Trial Examiner, and to Respondent's Motion for Reconsideration, to the Order of the National Labor Relations Board denying said Motion, and the omitted exhibits of Respondent, all contained in the entire record filed with this Court.

Martin Bros. did have a contract with Respondent Union which covered the plaster tenders, one of the classifications, by reason of being a member of an association, which association signed a master contract [R. 13, 42, 44]. Martin Bros. had a short form agreement with Respondent Union, which tied in with the master Building Trades agreement, covering laborers [stenographic transcript of testimony before the Trial Examiner; testimony of witness, Joseph D'Amico; Trial Examiner Tr. 73-81 incl.; Resp. Ex. 1; R. 66].

The factual statement on the part of Respondent concerning the unfair labor practices again differs from that of Petitioner.

Since their original short form agreement signed between the parties [Resp. Ex. 1; R. 66], there has been a collective bargaining relationship, both with respect to laborers and with respect to plaster tenders, between the Martin Bros. and the Union. This is unequivocally set forth in the transcript of the testimony before the Trial Examiner, in the testimony of Respondent's witness, Joseph D'Amico [transcript of testimony before the Trial Examiner, 67, 104, 109, *et seq.*].

This is especially clear in said testimony [transcript of stenographic testimony before the Trial Examiner, 105-115 incl.; Resp. Exs. 9, 10, 11].

Accordingly, the Respondent's statement of the case is simple; there was no commission of any unfair labor practices under any section of the Act; the individual employees, in violation of the collective bargaining agreement, were hired without a referral from the Union; other employees, members and nonmembers alike, whose names appeared on the list for chronological referral, were discriminated against; and the only factual situation is that a violation occurred by the employer of the contract.

The Board's Conclusions and Order as covered in the Brief of Petitioner are without reference to the substantial facts in the case, which overwhelmingly require reversal of the Board's Decision and Order.

## III.

## Argument.

### A. Respondent Had a Valid Short Form Agreement With Martin Bros.

The entire issue in this case was limited to the question of whether there was a short form agreement in existence. If it existed, there were no unfair labor practice violations.

Respondent's Exhibit 1 [R. 66], the testimony of Joseph D'Amico in behalf of Respondent [transcript of stenographic testimony before the Trial Examiner 67, 104, 109, 115 *et seq.*] and Respondent's Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, clearly establish the existence of the short form agreement and its operation between the parties.

Originally and at all times, it was the contention of the Board, that there was no existing contract. The law is hornbook that short form agreements automatically renewable from year to year, with definite cancellation dates, are valid.

The Decision and the Order of the Board, dated May 20, 1959, did not decide with respect to the existence, or nonexistence, of any agreement; in fact, the Decision merely adopted the Intermediate Report and the Recommended Order of the Examiner of January 27, 1959.

In *Bay Area Painters And Decorators Joint Committee, Inc. v. Orack,* 102 Cal. App. 2d 81, at pages 82, 83, the Court said:—

> "An employer who is not a member of one of the associations may become a party to the agree-

ment either by joining the association or by signing the agreement individually; in the latter case such a party is designated a nonmember signatory."

That was exactly the status of Martin Bros. in their short form contract [R. 66] with the Respondent Union.

Short form agreements in the building and construction industry are not new.

Where employers are members of an association, they become parties to the master agreement through the association; where they are not members of the association, they sign or adopt short forms agreeing to be bound by the provisions of the master contract.

The case of *Levinsohn Corp. v. Joint Board of Cloak, Suit, Skirt, etc.,* 299 N. Y. 454 held valid the same type of short form agreement that was involved in the instant case.

The facts establish a valid short form agreement [testimony of Joseph D'Amico; transcript of stenographic testimony of Trial Examiner, 67, 104, 109, 115 *et seq.; Respondent's Exs.* 2, 3, 4, 5, 6, 7, 8, 9].

Moreover, it was established without any contradiction [transcript of stenographic testimony of Trial Examiner 113, 114] that Martin Bros. paid health and welfare, both on the plasterers, and then on the laborers since 1955.

We quote from such testimony, as follows:—

[Pp. 113, 114 and 115]:

"Q. (By Mr. Schullman): Now I show you—Mark that R-11 for identification.

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 11 for identification.)

Q. (By Mr. Schullman): I show you a document marked R-11 for identification, and ask you if you are familiar with that document? A. Yes.

Q. At whose request was that prepared?

A. Mine, by me.

Q. What records were used in the preparation?

A. We called the trust office; they have a record for every man that has been paid by the contractor.

Q. Who dictated this? A. Our trust office gave us this copy.

Q. As I believe this page shows, is it correct that Martin Brothers Plastering is reported paid in health and welfare, plasters code No. since 1953? A. That is for the plasters on top.

Q. And then it shows next that Martin Brothers has reported and paid health and welfare on a number of laborers code number 86219 since June 1955? A. That is correct.

Q. That is approximately the same time when the health and welfare began? A. That is right.

Mr. Schullman: I now ask to be offered in evidence R-11.

The Witness: These are what they paid in each month, soforth.

Q. (By Mr. Schullman): before we offer it, going back to—do you have a legend here, 1955, and the dates and the number? A. That is right.

Q. I presume the dates, the months reflect the months of 1955? A. That is right.

Q. The numbers reflect the number of employees that they used at that time? A. That is right.

Q. And whom they paid? A. That shows how many men that they used that particular month.

Q. Would that be laborers or plaster tenders? A. That would be laborers.

Q. Laborers? A. That is right.

Q. Would that be true of 1956? A. Yes.

Q. With respect to 1957, the numbers opposite the months, does that indicate the number of employees used by Martin Brothers during that month? A. That is right.

Q. And those were what, plaster tenders or laborers? A. Laborers.

Q. Referring to the other, to 1956, and in the right-hand side, which has January through December '56, and then it has numbers, does that show the number of laborers employed on whom payment was made during that period? A. That is laborers.

Q. Is that also true of 1958? A. That is right."

It is clear now, even though the Trial Examiner took a dual and incongrous position, that the Board determined that only a single issue is involved in this case.

This is clear from the Brief for the Petitioner, and this is clear as a result of the Motion of Respondent

for Reconsideration filed with the Board, and which Motion was denied by the Order of the Board on September 4, 1959 (see Order of the Board) wherein the Board clearly found only that "no contractual arrangement presently exists between the Respondent and Martin Brothers—."

The Board further stated:—

> "The Board did not undertake to decide whether the hiring clause in the present contract with the Associated General Contractors conforms with the requirements of the *Mountain-Pacific* case."

Hence, since the record is unmistakably clear that there is a short form agreement [Resp. Ex. 1; R. 66] that Martin Brothers and the Union proceeded thereunder; that Martin Brothers paid health and welfare continuously under said agreement [Resp. Ex. 11], the Court's Findings on this issue must be reversed.

In *Lewis v. Cable Co.* D. C. W. Pa. (1952), 30 L. R. R. M. 2603, it was held that the Coal Company was estopped from denying authority of the Coal Operators' Association to enter into National Bituminous Coal Wage Agreements where the facts showed that the Company made payments into the United Mine Workers Welfare and Retirement Fund under 1948 agreement, and that the Union believed that it had a contract with the Company.

In this case, there was no question but, in fact, it was admitted, that Martin Brothers did pay into the health and welfare fund of the laborers from 1955 to at least 1958. There is no question that the short form agreement [Resp. Ex. 1; R. 66], was real, valid and subsisting.

In *Distillery Rectifying & WWIU v. Brown,* 308 Ky. 380, it was held that where there is a contract providing for automatic renewal, *it is necessary* for either party to notify the other of their intent not to renew; otherwise, the contract will be renewed automatically.

See also:

*Aluminum Co. of America v. NLRB* (7th Cir.), 159 F. 2d 523.

The California law is clear that a collective bargaining agreement with an automatic renewal date is automatically extended on failure to give the specifically required notice of termination.

*Montaldo v. Hires Bottling Co.,* 59 Cal. App. 2d 642.

**B. The Board Did Not Properly Assert Jurisdiction Over the Respondent.**

However, we shall not advance argument on this phase since the entire case should be dismissed, predicated on the fact there was a valid short form agreement; that Martin Brothers, the employer, violated the agreement and did not utilize the referral of the union, thereby discriminating against a long list of union and nonunion employees who were on the list.

We believe it is conceded throughout the Brief filed for Petitioner, and, in fact, in the entire case, that if there is a short form agreement in existence, and it confounds the intelligence to deny the existence of such an agreement, in view of Respondent's Exhibit 1 [R. 66], and in view of the admitted testimony of payments by Martin Brothers on labor, health and welfare pro-

grams, then the Union was entitled to take the action to enforce its contract and there was no violation of Section 8(b)(2) and (1)(A) of the Act.

This Court in the remand in the case of *National Labor Relations Board v. Mountain-Pacific Chapter of Assoc. Gen. Con.,* 270 F. 2d 425, 429, specifically objected to the finding of the Board that the contract of the employer and union was illegal *on its face* because it did not contain the safeguards the Board wrote for legal hiring agreements in the *Mountain-Pacific* case.

The 9th Circuit Court in the *Mountain-Pacific* case laid down a simple premise that an exclusive hiring hall in itself is not illegal, and a contract providing one is not invalid merely because the parties did not write in language to prohibit discriminatory hiring. The Court stated:—

> "It is apparent then that a contract which contains discriminatory provisions is illegal *per se.* It is also patent that a contract which is fair on its face is not unlawful in and of itself simply because it does not contain clauses prohibitory of illegal action."

The Court, in its remand, actually directed or suggested to the Board that it find from the facts, evidence of an intent upon the part of the signatories, of actual violation in practice.

This Court, in the *Mountain-Pacific* remand case, enunciated that the burden of proof is on the Government.

Admittedly, in this matter, if there is a short form agreement in existence, then this case must be dismissed.

Admittedly, there is such a short form agreement, and the burden to prove the contrary is on the Government, and this burden has not been met by the evidence; in fact, the evidence substantially establishes the existence of such a short form agreement and that the parties substantially abided by it, as indicated clearly by the payment by the employer, of health and welfare contributions.

## IV.
## Conclusion.

FROM THE FOREGOING FACTS AND LAW, AND BASED UPON THE ENTIRE RECORD IN THIS CASE, IT IS URGED THAT ENFORCEMENT BE DENIED THE NATIONAL LABOR RELATIONS BOARD IN THIS MATTER, AND THAT, UPON REVIEW OF THE ENTIRE RECORD, THE ACTION OF THE BOARD IN ITS DECISION AND ORDER BE REVERSED.

Dated: October 7, 1960.

Respectfully submitted,

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*Attorney for Respondent Union.*